NEPTUNE ASIA SERVICES SDN BHD & ANOR v. TRANS FAME OFFSHORE SDN BHD; AWGKU MOHD REZA FARZAK AWG DAUD & ORS (INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN JC
[ORIGINATING SUMMONS NO: WA-28JM-21-09-2020]
24 JANUARY 2021

Abstract – *Sections 414(3)(b) and (9) of the Companies Act 2016 do not empower the court to remove the rights of the shareholders. The court would not act where the effect of the matter is the proposal for reduction of the share capital and preference shares which would be akin to the shares being 'expropriated'. Creditors could not displace the rights of the members to its shares even in a judicial management regime. Any alteration in the constitution of a company, pursuant to s. 414(3)(b) of the Companies Act 2016, if permissible, should first be brought before a creditors' meeting held under s. 420(1)(b) of the same Act.*

COMPANY LAW: *Articles of association – Company's constitution – Alteration to add articles – Application for – Whether proposed alterations to company's existing constitution in line with insolvency principles and objectives of judicial management provisions – Whether alterations reasonable and required for any proposal or scheme or arrangement to succeed – Whether court empowered to remove rights of shareholders where effect of matter is proposal for reduction of share capital – Whether creditors could displace rights of members to its shares even in judicial management regime – Whether applicant had locus standi to make application – Companies Act 2016, s. 414(3)(b) & (9)*

In the present application, the applicant applied, pursuant to s. 414(3)(b) and (9) of the Companies Act 2016 ('Act'), for the followings orders: (i) the Constitution of the respondent ('company') be altered to add art. 7A and amend art. 61; (ii) any application for confirmation or sanction of a resolution for the capital reduction or the respondent shall be made in these proceedings; and (iii) liberty to apply for any further or other orders, including the approval or confirmation of any exercise of the added art. 7A or the amended art. 61, including where such approval or confirmation is required or applied for under ss. 116 or 412 of the Companies Act 2016 ('encl. 22'). In support of its application, the applicant submitted, *inter alia*, that (i) the proposed alterations to the company's existing constitution were in line with insolvency principles and the objectives of the judicial management provisions; (ii) the alterations were reasonable and required for any proposal or scheme or arrangement to succeed; (iii) the question of whether existing shareholders must go or could stay was fundamental to the

A ability of the judicial manager ('JM') to make a proposal acceptable to the creditors; (iv) the design of the scheme that would lead to the survival of the company very much depended on what the financial position of the company was; (v) the white knight had specified the amount it was prepared to fund and a list of conditions with the important question of whether it was entitled B to become the new shareholder of the company if they were expected to inject funds to rehabilitate the company; (vi) the directors and shareholders of the company failed in their proposed scheme of arrangement and had not taken any steps to deny the creditors' claims were unfounded or to have injected funds; (vii) since the company was now without share capital, the C company could not operate and thus the existing shareholders should not be given any say in the future direction of the company; (viii) extracting value from the company's ongoing contracts was nearly impossible without the aid of fresh funds and the only viable option was to seek fresh funds from a white knight to bargain with the creditors while continuing to extract value from the ongoing contracts; (ix) if there was no legal mechanism for the above to D happen, the survival of the company would not be achievable; (x) there was no difference in substance this case from a reduction or cancellation of capital where a company may reduce its share capital by cancelling any paid up share capital that is lost or unrepresented by available assets by way of a special resolution and subject to confirmation of the court; (xi) the proper E question to ask was whether the existing shareholders of the company should be given any say in the future direction of the company when its paid up capital has been depleted; (xii) there were parallels to be drawn between a judicial management and a winding up so far as it concerned the shareholders; (xiii) the only viable option in this case was to seek for fresh F funds from a white knight to bargain with creditors while continuing to extract value from the company's ongoing contracts and that this could only be achieved by a reduction of the issued and paid up capital of the company to be reduced to make way for the white knight to inject fresh capital; and (xiv) ss. 414(3)(b), (9) and (10) of the Act, read together with company's G constitution, allowed the court to alter the company's constitution.

Held (dismissing encl. 22):

(1) A company may reduce its share capital by cancelling any paid up share capital that is lost or unrepresented by available assets by way of a special resolution and subject to confirmation of the court, pursuant to H s. 116 of the Act. The reduction of share capital by the court under s. 116 of the Act is a right given to the company itself and not to any other parties. The other methods available to a company is for the company to apply s. 115(b) of the Act for a reduction of share capital, unless otherwise provided by the constitution. However, such right is I subject to the solvency requirements under s. 117(3) of the Act. Where a reduction of capital is sought, it must not only be just and equitable to the creditors of the company but also to its shareholders and to the public at large. (paras 10, 11 & 14)

(2) A perusal of encl. 22 and the proposed amendments to the company's articles/constitution would effectively confer rights to the creditors to allot new shares and to cancel existing shares by reducing the share capital and wiping off RM8 million in capital belonging to BAP Resources Sdn Bhd, the second intervener, and the sum of RM5 million by way of preference shares. This would be of no benefit to the company and to the existing shareholders as the monies, for what it was worth, had been raised and accounted for as capital for the company which would have translated into, *inter alia*, the assets and goodwill of the company. Enclosure 22 would also result in depriving the company's shareholders of their legitimate ownership of their shares which was diametrically opposed to the proprietary nature of a share. (paras 15 & 16)

(3) A reading of s. 414 of the Act and the Act *in toto* did not provide a power to any creditor and/or the JM to reduce the share capital of the company. The proposed amendments, as per encl. 22, were outside the threshold of s. 414(9) of the Act as Parliament, in its wisdom, would not have envisaged the said s. 414(9) of the Act to be exercised or utilised in such a manner as to take away the rights of the existing shareholders of the company by way of a judicial management process. (paras 18 & 21)

(4) The company's memorandum and articles of association ('M&A') was an internal document, being a statutory contract between the company and each member and between the members *inter se*, which by law only gave the members the right to amend the M&A. Neither the applicant nor any of the other creditors had a right to or was entitled to call for a special resolution to amend the company's M&A, save as was provided by s. 115 of the Act. (para 25)

(5) Sections 414(3)(b) and (9) of the Act did not empower the court to remove the rights of the shareholders in the circumstances as prayed for, and the court would not act where the effect of the matter is the proposal for reduction of the share capital and preference shares would be akin to the shares being 'expropriated'. The creditors could not displace the rights of the members to its shares even in a judicial management regime. Enclosure 22 may ultimately result in the current shareholders being removed and for the third parties to take control, resulting in the shareholders and preference shareholders losing all their rights as shareholders permanently. Section 414(9) of the Act, by the words 'Any alteration in the constitution made by virtue of an order under para. (3)(b)' was only intended to be applicable where the court had made an order under sub-s. (3)(b) and effect is to be given to such order made, and in circumstances where such order would contravene the company's constitution. Sub-section (9) was not meant to be applied in

A cases where there was no prior court order. Once a company is placed under judicial management, the management of the company is vested in the JM and they are the only proper party in the circumstances to institute encl. 22. Any alteration in the constitution of the company, pursuant to s. 414(3)(b) of the Act, if permissible, should first be brought B before a creditors' meeting held under s. 420(1)(b) of the Act. (paras 30-34)

(6) Any application as per encl. 22 should rightly be brought by the JM and not the applicant, who had no *locus standi* to make such an application as in encl. 22. On the contention that any alteration to the company's C M&A or constitution which prejudiced the members' rights and therefore lacked *bona fide*s, the applicant failed to prove that encl. 22 was for the benefit of the company as a whole. (paras 37 & 38)

Case(s) referred to:

D *Citco Banking Corporation NV v. 1. Pusser Limted And Anor (Eastern Caribbean Supreme Court) (British Virgin Islands) [2007] UKPC 13* ***(refd)***

Heng Mui Pheow v. Tan Ting Koon And Others (1989) 1 SLR 651 ***(refd)***

In Re JM Land Sdn Bhd [2011] 9 CLJ 682 HC ***(refd)***

Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case [2018] 10 CLJ 412 HC ***(refd)***

E *MTD Infraperdana Bhd (formerly known as Dewina Bhd (No 2) [2004] 1 MLJ 133* ***(refd)***

Re Engineering Construction (Pte) Ltd (Under Judicial Management) [1992] 2 SLR 1083 ***(refd)***

Shencourt Sdn Bhd v. Perumahan NCK Sdn Bhd [2005] 8 CLJ 652 HC ***(refd)***

Tan Sri Dato Muhammad Ali Hj Hashim v. Sindora Berhad & Ors [2013] MLRHU 405 ***(refd)***

Legislation referred to:

F Companies Act 2016, ss. 115(b), 116, 117(3), 405, 412, 414(3)(b), (9), (10), 420(1)(b), 421(2)

Other source(s) referred to:

Krishnan Arjunan, *Modern Company Law in Malaysia*, p 122

Rabindra S Nathan, *Law and Practice of Corporate Insolvency in Malaysia*, G para 4.005, p 67

For the 1st applicant - Shim De Zhen & Hazwan Lee; M/s Yeoh Shim Siow & Lay Kuan
For the 2nd applicant - Mak Lin Kum & Layyin Teh Hassan; M/s Syed Ibrahim & Co
For the respondent - Kennie Ang Joo Koon; M/s Ang & Lau
For the 1st, 3rd & 4th interveners - Tay Yi Kuan; M/s Roshan
H *For the 2nd intervener - Noor Akhza Ahmad Khairuddin; M/s Aqeeb & Co*

Reported by Najib Tamby

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JUDGMENT
(encl. 22)

Nadzarin Wok Nordin JC:

[1] In encl. 22 (encl. 22), the applicant, Neptune Asia Services Sdn Bhd (applicant) has applied to this court pursuant to s. 414(3)(b) and (9) of the Companies Act 2016 and the inherent jurisdiction of this court for, *inter alia*, the following orders:

(i) the constitution of the respondent company (company) be altered to add art. 7A and amend art. 61 in the manner as underlined and bolded and set out in Appendix A;

(ii) any application for the confirmation or sanction of a resolution for the capital reduction or the respondent shall be made in these proceedings before this court; and

(iii) liberty to apply to this court for any further or other orders, including the approval or confirmation of any exercise of the added art. 7A or the amended art. 61, including where such approval or confirmation is required or applied for under s. 116 or s. 412 of the Companies Act 2016.

[2] The intended amendments or alterations to the articles sought were as follows:

Proposed Article 7A

Notwithstanding Article 7, a resolution of creditors of the company to allot and issue shares of the company to such persons on such terms and conditions, including but not limited to such preferred, deferred or other special rights or such restrictions, whether with regards to dividend, voting, return of capital, or otherwise including upon terms that Section 85 of the Act shall not apply, shall be valid and effectual if approved at a meeting of creditors convened pursuant to an order of court or convened by a Judicial Manager(s) whereby seventy-five per centum of the total value of creditors whose claims have been accepted by the Judicial Manager(s), present and voting at the meeting either in person or by proxy, shall have voted in favour of the resolution. For the avoidance of doubt, the term "creditors" shall mean "creditors whose claims have been accepted by the judicial manager" as provided in Section 421(2) of the Act.

Proposed Amended Article 61

Notwithstanding anything to the contrary in this Constitution, the company may by special resolution or by a resolution of its creditors approved by seventy-five per centum of the total value of creditors whose claims have been accepted by the Judicial Manager(s) present and voting either in person or by proxy at a meeting of creditors convened pursuant to an order of court or convened by a Judicial Manager(s), reduce its share

A capital in any manner including cancelling any paid up share capital whether in the form of ordinary shares or preference shares, and with, and subject to, any incident authorised, and consent required by law, or as or otherwise ordered by the court. For the avoidance of doubt, the term "creditors" shall mean "creditors whose claims have been accepted by the judicial manager" as provided in Section 421(2) of the Act.

B **[3]** I had on 11 November 2021 heard the respective counsel orally on encl. 22 and delivered my decision on 16 November 2021 *via* email to the parties whereby I dismissed encl. 22 with costs. The applicant being dissatisfied with my decision has appealed against the same and herewith are my written grounds.

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Applicant's Case

[4] The applicant had contended, amongst others, that:

(i) the proposed alterations to the company's existing constitution are in line with insolvency principles and the objectives of the judicial management provisions;

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(ii) the alterations are reasonable and required for any proposal or scheme of arrangement to succeed.

[5] It was thus submitted by the applicant and supported by the second applicant, Messrs Syed Ibrahim and Co, that *inter alia*:

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(i) the question of whether existing shareholders must go or can stay is fundamental to the ability of the judicial manager (JM) to make a proposal acceptable to the creditors;

F (ii) the design of the scheme that would lead to the survival of the company very much depends on what the financial position of the company is;

(iii) the proposed alterations to the company's existing constitution are in line with insolvency principles and the objectives of the judicial management provisions;

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(iv) the alterations are reasonable and required for any proposal or scheme of arrangement to succeed;

(v) the white knight herein, had specified the amount it is prepared to fund and a list of conditions with the important question of whether it is entitled to become the new shareholder of the company if they were expected to inject funds to rehabilitate the company;

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(vi) the directors and shareholders of the company have failed in their proposed scheme of arrangement and had not taken any steps to deny the creditors' claims are unfounded or to have injected funds;

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(vii) since the company was now without share capital, the company cannot operate and thus the existing shareholders should not be given any say in the future direction of the company;

(viii) extracting value from the company's ongoing contracts is nearly impossible without the aid of fresh funds and the only viable option is to seek fresh funds from a white knight to bargain with creditors while continuing to extract value from the ongoing contracts;

(ix) if there is no legal mechanism for the above to happen, the survival of the company will not be achievable;

(x) there is no difference in substance this case from a reduction or cancellation of capital where a company may reduce its share capital by cancelling any paid up share capital that is lost or unrepresented by available assets by way of a special resolution and subject to confirmation of the court;

(xi) the proper question to ask is whether the existing shareholders of the company should be given any say in the future direction of the company when its paid up capital has been depleted;

(xii) there are parallels to be drawn between a judicial management and a winding up so far as it concerns the shareholders;

(xiii) the only viable option in this case for to seek for fresh funds from a white knight to bargain with creditors while continuing to extract value from the company's ongoing contracts and that this can only be achieved by a reduction of the issued and paid up capital of the company to be reduced to make way for the white knight to inject fresh capital;

(xiv) sections 414(3)(b), (9) and (10) of the Companies Act 2016 read together with company's constitution allows the court to alter the company's constitution.

Opposition By First, Second & Fourth Interveners

[6] In opposition to encl. 22, it was submitted by the first, second and fourth interveners amongst others as follows:

(i) the applicant has no *locus standi* to bring encl. 22;

(ii) there has been non-compliance with ss. 414(9), 420 and 421 of the Companies Act 2016 in making encl. 22;

(iii) any alteration to the company's M&A or constitution which prejudices the members rights lacks *bona fides*;

(iv) the proposal made out in encl. 22 was neither assessed nor due diligence done by the judicial manager nor put to the creditors to be approved;

A (v) the applicant appears to compel the judicial manager to put forth the proposal to the creditors for acceptance;

(vi) the alleged white knight who apparently intends to inject monies into the company has not been evidenced by any financial capabilities to roll out their plan;

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(vii) the amendment being sought in encl. 22 in effect is to confer rights to the creditors to allot new shares and to cancel existing shares after reducing the share capital by way of wiping up capital of RM8 million belonging to the second intervener and the sum of RM5 million by way of preference shares which has no benefit to the company;

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(viii) there is no valid justification for the prayers in encl. 22 and that the same will remove the existing shareholders and preference shareholders without any remedy;

(ix) there is no plan to redistribute the capital raised for the company;

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(x) the interveners declining to inject further capital into the company is not a valid basis to remove them and to extinguish their shareholdings;

(xi) the amendments sought in encl. 22 are solely to empower creditors and third parties to control and manage the company which is an abuse

E of process;

(xii) enclosure 22 is not within the ambit of the judicial management.

Judicial Manager's Submissions

[7] It was submitted by the judicial manager that:

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(i) the paid up capital of the company had been wiped out and there are no sufficient assets to pay its creditors;

(ii) the company has been trading on the credit from its creditors which means that the creditors have been funding the operation and business

G of the company;

(iii) the judicial manager is of the view that there are considerable obstacles in achieving the objectives of the judicial management;

(iv) the statement of proposal has been tabled to the creditors with a resounding approval of 94/82% of creditors present and voting in

H favour;

(v) enclosure 22 allows for the prospect of higher returns to creditors of the company while potentially returning the company as a going concern;

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(vi) enclosure 22 will provide the creditors with the power to cancel the existing shares of the company and to allot and issue new shares in the company which will make the company a more attractive prospect to any white knight;

(vii) any reduction of share capital is subject to the overriding powers and safeguard of the court;

(viii) enclosure 22 would realistically provide an avenue to the creditors a better recovery rate of debt owed by the company by giving them a chance to subscribe to the shares of the company as a compromise to reduce the debt and it would thus be fair and equitable that the decision making on the reduction or cancellation of the company's paid up capital be shifted to its creditors who have supported the company by way of credit extended;

(ix) it is in the interest of creditors to provide them an avenue to receive higher returns for the debt owed to them.

Findings Of The Court

[8] The applicant herein had also sought to compare the treatment of contributories in a winding up scenario with that in a judicial management regime by referring to various sections in the Companies Act 2016 and attempted to draw parallels between the same when it concerns the shareholders.

[9] It is pertinent to note that as general rule, a company is prohibited from reducing its share capital and I quote the learned author Krishnan Arjunan in his book entitled "*Modern Company Law in Malaysia*" at p. 122 therein wherein the learned author states:

> The money raised by companies by the issued of shares constitutes the company's issues share capital. These are the funds to which creditors look to for payment of their debts. Moreover shareholders have a right to expect that funds so raised will be employed in the advancement of the objects of the company, if stated in the constitution. As a consequence there is a general rule that a company is prohibited from reducing its issued share capital. Thus, in order to protect the interests of the shareholders and creditors, limited companies are obliged to maintain their issued share capital.

[10] In law, a company may reduce its share capital by cancelling any paid up share capital that is lost or unrepresented by available assets by way of a special resolution and subject to confirmation of the court pursuant to s. 116 of the Companies Act 2016 which reads:

(i) subject to confirmation by the court, a company may, by a special resolution, reduce the share capital of the company in any way which includes all or any of the following:

(a) by extinguishing or reducing the liability on any of the shares of the company in respect of unpaid share capital;

(b) by cancelling any paid-up share capital which is lost or unrepresented by available assets;

A (c) by returning to the shareholders any paid-up share capital which is in excess of the needs of the company.

[11] It is pertinent to note that the reduction of share capital by the court under s. 116 of the Companies Act 2016 is a right given to the company itself and not to any other parties. The other methods available to a company B *vis-à-vis* the reduction of share capital is for the company to apply s. 115(b) of the Companies Act 2016 for a reduction of share capital, unless otherwise provided by the constitution, but that such right is subject to the solvency requirements as per s. 117(3) of the Companies Act 2016.

C **[12]** In *MTD Infraperdana Bhd (formerly known as Dewina Bhd (No 2)* [2004] 1 MLJ 133, Abdul Malik Ishak J quoting the Court of Appeal in the UK case of *British and American Trustee and Finance Corp v. Couper* (1894) AC 399 stated:

> In exercising its discretion, the court is always concerned to see that the D reduction is fair and equitable. In *British and American Trustee and Finance Corpn v. Couper (HL)*, Lord Herschell LC remarked at p. 406 that no scheme ought to be confirmed unless the court was satisfied that it will not work unjustly or inequitably. It seemed that the court would not be concerned to consider the motive for the reduction. Motive appears to be of less significant.

E **[13]** I further refer to *In Re JM Land Sdn Bhd* [2011] 9 CLJ 682; [2010] MLJU 1773, where the High Court therein held, quoting Walter Woon, "*Company Law*" 2nd edn that:

> (ii) Learned author Walter Woon, "*Company Law*" 2nd edition does not F prescribe for the petition to be heard *ex parte*, for any reasons. At page 623 it is stated:
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> > The court is not primarily concerned with the business aspects of the capital reduction. When the court is asked to confirm a reduction it has a twofold function: first, to consider whether the creditors – present or future – would be prejudiced; secondly, to G ensure that the reduction is fair among the member *inter se*. The court should also consider the public interest. It is not the court's function to consider whether the reduction is wise or desirable from a business point of view.
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> Before confirming a reduction of capital, the court must be satisfied that H with respect to every creditor who is entitled to object either his consent to the reduction has been obtained or his claim has been discharged or secured.

[14] It would thus appear to me from a reading of the aforementioned sections and the cases cited that in general where a reduction of capital is I sought it must not only be just and equitable to the creditors of the company but also to its shareholders and to the public at large.

[15] A perusal of encl. 22 and the proposed amendments to the company's articles/constitution as stated therein would effectively confer rights to the creditors to allot new shares and to cancel existing shares by reducing the share capital and wiping off RM8 Million in capital belonging to BAP Resources Sdn Bhd, the second intervener, and the sum of RM5 Million by way of preference shares. I hold that this will be of no benefit to the company and to the existing shareholders as the monies, for what it is worth, had been raised and accounted for as capital for the company which would have translated into amongst others the assets and goodwill of the company.

[16] I further hold that encl. 22 would also result in depriving the company's shareholders of their legitimate ownership of their shares which this court finds is diametrically opposed to the proprietary nature of a share. I wish to refer to the Privy Council case of *Citco Banking Corporation N.V v. 1. Pusser Limited and anor (Eastern Caribbean Supreme court) (British Virgin Islands)* [2007] UKPC 13, which was referred to me by counsel for the first and second interveners wherein the Privy Council had held:

> [19] Their Lordships also note that in *Gambotto v. WCP Ltd* (1995) 182 CLR 432, 127 ALR 417, 16 ACSR 1 the High Court of Australia created a new rule for amendments which they characterised as conferring powers of "expropriation" of the shares of a minority. Such an amendment could be justified only if it was reasonably apprehended that the continued shareholding of the minority was detrimental to the company, its undertaking or the conduct of its affairs and expropriation was a reasonable means of eliminating or mitigating that detriment. It was not enough in such a case that the amendment was considered by the majority shareholders to be in the interests of the company as a corporate entity or even that it actually was for the company's benefit. In a joint judgment, Mason CJ, Brennan, Deane and Dawson JJ said at p. 446:
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> > Notwithstanding that a shareholder's membership of a company is subject to alterations of the articles which may affect the rights attaching to the shareholder's shares and the value of those shares, *we do not consider that, in the case of an alteration to the articles authorizing the expropriation of shares, it is a sufficient justification of an expropriation that the expropriation, being fair, will advance the interests of the company as a legal and commercial entity or those of the majority, albeit the great majority, of corporators. This approach does not attach sufficient weight to the proprietary nature of a share and, to the extent that English authority might appear to support such an approach, we do not agree with it* (emphasis added).

[17] I now turn to the judicial management regime, wherein the judicial manager only has such powers as ascribed to him under s. 414 of the Companies Act 2016 and the Ninth Schedule thereto which are as follows:

A Section 414 of the Companies Act 2016

(1) On the making of a judicial management order, the judicial manager shall take into his custody or under his control all the property to which the company is or appears to be entitled.

B (2) During the period for which a judicial management order is in force, all powers conferred and duties imposed on the directors by this act or by the constitution of the company shall be exercised and performed by the judicial manager and not by the directors, but nothing in this subsection shall require the judicial manager to call any meetings of the company.

C (3) The judicial manager of a company shall:

(a) do all such things as may be necessary for the management of the affairs, business and property of the company; and

(b) do all such other things as the court may order.

D (4) Without prejudice to the generality of para. (3)(a), the powers conferred by that subsection shall include the powers specified in the Ninth Schedule.

(5) The judicial manager may apply to the court for directions in relation to any particular matter arising in connection with the carrying out of his functions.

E (6) Nothing in this section shall be taken as authorizing the judicial manager of a company to make any payment towards discharging any debt to which the company was subject on the making of the judicial management order unless:

F (a) the making of the payment is sanctioned by the court or the payment is made under a compromise or arrangement so sanctioned; or

(b) the payment is made towards discharging sums secured by a security or payable under a hire purchase agreement, chattels leasing agreement or retention of title agreement to which s. 415 applies.

G Ninth Schedule

The judicial manager may exercise all or any of the following powers:

(a) to take possession of, collect and get in the property of the company and, for that purpose, to take such proceedings as he seems H expedient;

(b) to sell or otherwise dispose of the property of the company by public auction or private contract;

(c) to borrow money and grant security for the borrowing over the I property of the company;

(d) to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;

(e) to bring or defend any action or other legal proceedings in the name and on behalf of the company;

(f) to refer to arbitration any question affecting the company;

(g) to effect and maintain insurances in respect of the business and property of the company;

(h) to use the company's seal;

(i) to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document;

(j) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;

(k) to appoint any agent to do any business which he is unable to do himself or which can more conveniently be done by an agent and to employ and dismiss employees;

(l) to do all such things, including the carrying out of works, as may be necessary for the realisation of the property of the company;

(m) to make any payment which is necessary or incidental to the performance of his functions;

(n) to carry on the business of the company;

(o) to establish subsidiaries of the company;

(p) to transfer to subsidiaries of the company the whole or any part of the business and property of the company;

(q) to grant or accept a surrender of a lease or tenancy of any of the property of the company, and to take a lease or tenancy of any property required or convenient for the business of the company;

(r) to make any arrangement or compromise on behalf of the company;

(s) to call up any uncalled capital of the company;

(t) to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company and to receive dividends, and to accede to trust deeds for the creditors of any such person;

(u) to make or defend an application for the winding up of a company;

(v) to do all other things incidental to the exercise of the foregoing powers.

[18] I find that a reading of the above section and the Companies Act 2016 *in toto* does not provide a power to any creditor and/or the judicial manager to reduce the share capital of the company. It is therefore imperative for this

court to determine the reasons which Parliament had enacted the judicial management provisions. This can be found by a reading of s. 405 of the Companies Act 2016 which provides:

> An application for an order that a company should be placed under a judicial management and for an appointment of a judicial manager may be made to the court by the company or its creditor if the company or its creditor considers that:
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> (a) the company is or will be unable to pay its debts; and
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> (b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.

and in the case of *Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case* [2018] 10 CLJ 412 where Wong Chee Lin JC (as Her Ladyship then was) in deciding the first Malaysian case on judicial management went through the history of the establishment of the judicial management process in Malaysia and stated amongst others that:

> [21] It is clear from the Hansard, that the judicial management was introduced to rehabilitate companies that are under financial distress and to reduce the number of cases where companies are wound up.
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> Datuk Liang Teck Meng (Simpang Renggam):
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> minta Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan menyatakan berapakah jumlah kes syarikat yang digulungkan sepanjang tempoh 2010 hingga 2014 dan apakah peranan kerajaan dalam menangani kes syarikat yang digulungkan?
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> Timbalan Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan (Dato' Paduka Ahmad Bashah bin Md Hanipah): ...
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> Jumlah syarikat yang digulungkan sepanjang tempoh 2010 hingga bulan Ogos 2014 adalah sebanyak 9,010. Dari jumlah tersebut sebanyak 3,396 syarikat telah digulungkan secara sukarela manakala sebanyak 5,614 syarikat telah digulungkan melalui perintah mahkamah. Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan prihatin berhubung keperluan memperkenalkan satu mekanisme untuk menyelamatkan syarikat-syarikat yang mengalami masalah kewangan. Namun masih boleh dipulihkan untuk beroperasi secara sedia kala.
>
> Dalam hal ini, Suruhanjaya Syarikat Malaysia yang merupakan agensi kementerian ini telah mengambil inisiatif untuk memperkenalkan beberapa mekanisme penyelamat korporat melalui pembaharuan yang sedang dilakukan kepada Akta Syarikat 1965. Mekanisme yang dicadangkan ini akan menjadi satu alternative kepada penggulungan atau pembubaran syarikat. Antaranya ialah pengurusan kehakiman ...

[19] Further, the learned author, Rabindra S Nathan and a team of expert contributors in the textbook "*Law and practice of Corporate Insolvency in Malaysia*" had stated at para 4.005 p. 67 of their book that:

> ... the JM is conceived as a middle ground where a professional insolvency practitioner is appointed to manage the company as well as come up with a proposal to rehabilitate the company and at the same time, a moratorium is imposed to insulate the company from law suits being commenced or continued against it.

[20] After a careful consideration of *inter alia* ss. 405 and 414 of the Companies Act 2016, the Companies Act 2016 in general, the *dicta* of Her Ladyship Wong Chee Lin and the above-mentioned textbook collectively, it is this court's view *inter alia* that the judicial management regime was introduced to rehabilitate companies where there is a reasonable prospect of reviving the company as a going concern as opposed to a winding up scenario where the object in a winding up scenario is to preserve the company's assets for the fair distribution amongst the creditors and to protect the interest of creditors and the public as held in *Shencourt Sdn Bhd v. Perumahan NCK Sdn Bhd* [2005] 8 CLJ 652; [2005] MLJU 571.

[21] Accordingly, I hold that the proposed amendments as per encl. 22 are outside the threshold of s. 414(9) of the Companies Act 2016 as Parliament, in its wisdom, would not have envisaged the said s. 414(9) of the Companies Act 2016 to be exercised or utilised in such a manner as to take away the rights of the existing shareholders of the company by way of a judicial management process.

[22] This court was also invited to consider the Singapore position where it was argued that a judicial manager should make a proposal for the reduction of capital to creditors *via* a scheme of arrangement procedure, and this court was referred to the case of *Re Engineering Construction (Pte) Ltd (Under Judicial Management)* [1992] 2 SLR 1083 where LP Thean J in addressing the matter as regards capital reduction said:

> ... that it is not directly or indirectly used by the directors and shareholders to the detriment of creditors and unsecured creditors in particular. The motives of the application should therefore be clearly honourable. Further, a company whose debts far exceed its assets in effect belongs to its creditors. The court must show great heed to the wishes and views of such creditors.

[23] With respect, from a reading of *Re Engineering Construction (Pte) Ltd (Under Judicial Management) (supra)* I find that LP Thean J had in fact held in that case that:

> There are specific provisions in the Act governing the reduction of share capital and compromise between the company and its creditors, and these provisions must be complied with. Insofar as the reduction of share capital is concerned, s. 73 of the Act applies, and empowers the court to confirm

A a reduction of share capital resolved upon by a special resolution of the company. But before the court can make the order, the requirements of settlement of a list of creditors under s. 73(2) must be complied with or dispensation thereof be obtained from the court. In that connection, O. 88 rr. 5 and 7 of the Rules of the Supreme court 1970 prescribe the procedure for obtaining the necessary orders. As for the compromise between the company and its creditors, it falls squarely within s. 210 of the Act, and in seeking the court's approval of such a compromise, the provisions of ss. 210 and 211 of the Act must be complied with.

[24] Without the need of going through the specific provisions in the Singapore Companies Act (Cap 50, 1990 Ed), I have in my judgment herein also made mention of the specific provisions in our own Companies Act 2016 which deal with the reduction of a company's share capital by cancelling any paid up share capital, which I hold is only applicable to the company.

[25] I also agree with the respective interveners who object to encl. 22 that the company's memorandum and articles of association (M&A) is an internal document, being a statutory contract between the company and each member and between the members *inter se*, which by law only gives the members the right to amend the M&A. I hold that neither the applicant nor any of the other creditors have a right to or is entitled to call, for a special resolution to amend the company's M&A, save as is provided by s. 115 of the Companies Act 2016. One needs to look no further than in *Tan Sri Dato Muhammad Ali Hj Hashim v. Sindora Berhad & Ors* [2013] MLRHU 405 where Vernon Ong J (as he then was) held:

> [13] On the other hand, the articles of association of a company are its internal regulations. It regulates the internal management and operations of the company; including the procedure for allotment and transfer of shares, classes of shares and variation of class rights, division of powers and the relationship between the general meeting of shareholders and the board of directors, account and audit, dividends and the rights and obligations of its members. The M&A are public documents; they are available for inspection by the general public (s. 11(2) CA 1965). In this context, the word 'member' is synonymous with the word 'shareholder'.
>
> [14] *In the light of the aforesaid, what is the effect of the articles of association (Articles) of a company. The Articles constitutes a statutory* contract (i) between the company and each member; and (ii) between the members *inter se* (s. 33(1) CA 1965). Consequently, both the company and the members are contractually bound to comply with the provisions of the Articles. In the event of any non-compliance, the defaulting party (be it the company or a member or members), may be subject to legal proceedings to enforce compliance with the Articles (see *Hickman v. Kent or Romney March Sheepbreeders' Association* [1951] 1 Ch 881; *Wood v. Odessa Waterworks Co* [1889] 42 Ch D 636)

Alteration Of Articles

[15] As a general rule, a company may by a special resolution alter its arts (s. 31(1) CA 1976). A special resolution is a resolution which requires 21 days notice specifying the intention to propose the special resolution and can be passed by a majority of not less than three-fourths of such members present and entitled to vote at the general meeting (s. 152(1) CA 1965).

(emphasis added)

[26] Even if I am held wrong in my above decision, I hold that the applicant in encl. 22 herein should be the judicial manager and not a creditor of the company as in encl. 22, and I therefore find that the applicant herein does not have the necessary *locus standi* to make the application herein as the applicant does not come within the provisions of s. 414(3)(b) and (9) of the Companies Act for the reasons to be mentioned hereinafter.

[27] I will now address s. 414(3)(b) and (9) of the Companies Act which provides:

(3) The judicial manager of a company shall:

(a) do all such things as may be necessary for the management of the affairs, business and property of the company; and

(b) do all such other things as the court may order.

(9) Any alteration in the constitution made by virtue of an order under para. (3)(b) is of the same effect as if duly made by resolution of the company, and the provisions of this act apply to the constitution as so altered accordingly.

[28] After a careful reading of the above subsections, I hold that the power under s. 414(3)(b) and (9) of the Companies Act 2016 is not unlimited and that the power in the said sections must be exercised for the purposes envisaged in Part III Division 8 Sub-Division 2 of the Companies Act and looking at the said subdivision in its entirety, it does not appear to this court that it was Parliament's intention that the judicial management regime was enacted so much so that shareholders will loose control and the company in the manner envisaged as per the prayers in encl. 22.

[29] Any attempt to alter the company's constitution must be exercised with caution and the court must in the circumstances exercise its discretion properly and balance the interests of all parties affected ie, creditors and members/contributories. In summary, the court has to be fair to all parties concerned and be slow to allow such an amendment to the constitution as sought in encl. 22.

[30] In this court's view, the said s. 414(3)(b) and (9) of the Companies Act 2016 does not empower this court to remove the rights of the shareholders in the circumstances as prayed for, and this court will accordingly not act

where the effect of the matter is the proposal for reduction of the share capital and preference shares will be akin to the shares being 'expropriated'. This court is of the further view that the creditors cannot displace the rights of the members to its shares even in a judicial management regime.

[31] All that said and done, this court finds that encl. 22 may ultimately result in the current shareholders being removed and for third parties to take control resulting in the shareholders and preference shareholders losing all their rights as shareholders permanently.

[32] It is also this court's decision that subs. 414(9) by the words in the said subsection that "Any alteration in the constitution made by virtue of an order under para. (3)(b)" is only intended to be applicable where the court had made an order under sub-s. (3)(b) and effect is to be given to such order made, and in circumstances where such order will contravene the company's constitution. Subsection (9) is not meant to be applied in cases where there is no prior court order.

[33] I further hold that once a company is placed under judicial management, the management of the company is vested in the judicial managers and that they are the only proper party in the circumstances to institute encl. 22. See a similar proposition held in the Singapore case of *Heng Mui Pheow v. Tan Ting Koon And Others* (1989) 1 SLR 651. It is the judicial manager who has to consider the viability of the proposal and to thereafter put the said proposal before the creditors for their approval.

[34] This court is hence of the further opinion that any alteration in the constitution of the company pursuant to s. 414(3)(b) of the Companies Act 2016, if permissible, should first be brought before a creditors' meeting held under s. 420(1)(b) of the Companies Act 2016 which states:

> (1) Where a judicial management order has been made, the judicial manager shall, within sixty days or such longer period as the court may allow, after the making of the order:
>
> (a) send a statement of his proposal for achieving one or more of the purposes mentioned in para. 405(1)(b) to the Registrar and to all creditors to their last known address; and
>
> (b) lay a copy of the statement before a meeting of the company's creditors summoned for the period of not less than fourteen days' notice.

[35] I note that the statement of proposal to the creditors had only stated as follows:

(i) Given the determinative effect that encl. 22 may have in the judicial management exercise, and outlook into encl. 22 is specifically mentioned in s. 5.2 of the explanatory statement as at page of encl. 201:

5.2 The Application for Amendment to Constitution (encl. 22)

On 12.11.2020, Neptune took out an application to seek an amendment of the Constitution of TFO. This was done in response to the request of a potential White Knight to take over TFO as a whole, which could only be done via amendment of TFO's Constitution to provide Creditors with the power to cancel the existing shares of TFO and allot and issue new shares in TFO.

There is no hearing date fixed as yet for this application. This application is strongly opposed by Reza and BAP.

This application was taken out during the administration of interim Judicial Manager No. 1. At the time of the filing of the application, TFO had many more running contracts. The situation is very different today, as explained above.

Nevertheless, the shareholders' funds of TFO may become positive if a large number and value of Creditors choose to accept shares in TFO as a compromise for certain amounts due to them. The Proposal to Creditors will not result in a 100j% repayment of the amounts due to Creditors. In this regard, Creditors may still want to explore the conversion of their debt owed by TFO into (redeemable equity instruments in TFO. The achievement of this position is however subject to Creditors' view going forward.

(ii) Further in para. 30 of the statement of proposal at p. 75 of encl. 201, the judicial manager gave his views as regards encl. 22:

30. The Judicial Manager No. 2 would like to advise that encl. 22 is still pending. If encl. 22 succeeds upon the terms applied for, this would allow Creditors to attend a meeting and vote on the question of cancellation of paid up capital, cancellation of shares of TFO and the issue of new shares for TFO. The Judicial Manager No. 2 has received a proposal from an interested third party who is interested in acquiring TFO via a fresh subscription of new shares in TFO provided that all existing shares are cancelled and that amounts owing to Creditors which cannot be addressed from the recovery of amounts due to TFO are converted into RCPS. No terms have been agreed to yet by the Judicial Manager.

[36] From the facts before this court, the proposal as per encl. 22 was only mentioned to the creditors in the said statement of proposal but the same has not been put to the vote to the creditors pursuant to the above section, and which then requires the creditors to approve the same by way of nothing less than 75% of the total value of creditors as provided under s. 421(2) of the Companies Act 2016 which provides as follows:

(1) A meeting of creditors, summoned under para. 420(1)(b), shall decide whether to approve the judicial manager's proposal.

A (2) The proposal shall be approved by seventy-five per centum of the total value of creditors whose claims have been accepted by the judicial manager, present and voting at the meeting either in person or by proxy and the proposal may be approved with modifications subject to the consent of the judicial manager to each modification.

B **[37]** Thus, any application as per encl. 22 should rightly be brought by the judicial manager as stated above and not the applicant who in my view has no *locus standi* to make such an application as in encl. 22.

[38] On the contention that any alteration to the company's M&A or constitution which prejudices the members' rights and therefore lacks *bona* C *tides*, I hold that the applicant has failed to prove that encl. 22 is for the benefit of the company as a whole.

[39] Wherefore in the circumstances, encl. 22 is hereby dismissed with costs of RM3,000 to be paid by the applicant to the first and fourth interveners jointly and RM2,000 to be paid to the second intervener.

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